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No. 02-___

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IN THE

Supreme Court of the United States

HELEN MOORE, *et al.*
Petitioner,

v.

DETROIT SCHOOL REFORM BOARD, *et al.*
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Michigan Public Act 10 of the Acts of 1999 violate Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, by changing the school board of the City of Detroit from an elected board to an appointed one where that change results in denying 60 percent of the black citizens of the State of Michigan the right to vote for school board while preserving that right for almost 100 percent of the white citizens of the State?

PARTIES TO THE PROCEEDING

The petitioners are Helen Moore, Agnes Aleobua, Stephen Conn, George Frazier, Mariatu Sesay, the Baptist Ministers' Conference, the Black Slate, Inc., the Coalition to Defend Affirmative Action by Any Means Necessary, the Community Coalition for Empowerment, Inc., the Eastside Ministers United in Action, the Keep the Vote—No Takeover Coalition, the Million Man Alumni Association, the Strike to Win Quality Education Caucus, United For Equality and Affirmative Action, and the Westside Ministers Alliance. The petitioners were plaintiffs in the district court and appellants in the Court of Appeals.

The respondents are the Detroit School Reform Board, Dr. David Adamany, former Chief Executive Officer of Detroit Public Schools, Dennis Archer, former Mayor of Detroit, and John Engler, the Governor of Michigan. The respondents were defendants in the district court and appellees in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI

The petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is reported at 293 F.3d 352 (6th Cir 2002) (App at 1a). The decision of the United States District Court for the Eastern District of Michigan is reported at 147 F. Supp. 2d 679 (ED Mich. 2000) (App at 41a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 2 of the Voting Rights Act of 1965 provides as follows:

> 42 U.S.C § 1973. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

2. Section 5 of the Voting Rights Act of 1965 provides as follows:

> 42 U.S.C § 1973c. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to

voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the

Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or proce dure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

JURISDICTION

The Sixth Circuit denied rehearing and rehearing en banc on August 9, 2002. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

STATEMENT OF THE CASE

The plaintiffs are students, teachers and citizens of Detroit, as well as labor and community organizations based in Detroit, who brought this action against the School Reform Board, its Chief Executive Officer, the Mayor of Detroit and the Governor of the State of Michigan asserting that Michigan Public Act 10 of the Acts of 1999 (the Takeover Act) had unlawfully deprived the City of Detroit, comprising 60 percent of the black citizens of the State of Michigan, of the right to vote for school board while preserving that right for almost 100 percent of the white citizens of the State. As this Act converted an elected office into an appointed one in a way that resulted in discrimination against black citizens, the

plaintiffs asserted that it violated their rights under the Voting Rights Act of 1965, as definitively construed by this Court in *Allen v. State Bd of Elections*, 393 U.S. 544, 569-570 (1969).

The plaintiffs further asserted that the Takeover Act violated their rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States and their right under Article 4, Section 29 of Michigan's Constitution to vote by referendum on an act designed to apply to Detroit alone.

On cross motions for summary judgment, the district court dismissed the plaintiffs' case in its entirety, holding, inter alia, that the claims under the Voting Rights Act were foreclosed by a Sixth Circuit decision rendered shortly after the current case was filed upholding the conversion of Cleveland's elected school board into an appointed one and declaring that *Allen* was not applicable in areas where Section 5 of the Voting Rights Act did not apply (App at 63a-64a citing *Mixon v. State of Ohio*, 193 F. 3d 389 (6th Cir. 1999)).[1] The district court further held that the plaintiffs had failed to prove a claim under the Fourteenth and Fifteenth Amendments or under the Michigan Constitution (App at 53a-61a, 65a-70a).

The plaintiffs filed an appeal of right to the Sixth Circuit. The plaintiffs asserted that the district court's decision and the panel decision in *Mixon* directly contradicted not only *Allen*, but this Court's decisions holding that Sections 2 and 5 of the Voting Rights, with exceptions not here relevant, had to be construed as setting the same substantive standards.

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[1] The plaintiffs in *Mixon* did not seek review en banc or by certiorari because the Ohio Court of Appeals struck down the Mayoral takeover in Cleveland three weeks after the Sixth Circuit decision. That decision was then reversed by the Ohio Supreme Court in December 2000. See *Malcolm-Smith v. Goff*, 1999 WL 96145 (10/21/99), *rev'd on procedural grounds*, 99 Ohio St 3d 316, 738 NE 2d 793 (2000).

Chisom v. Roemer, 501 U.S. 380 (1991). The Sixth Circuit panel, however, held that it was bound by the prior panel's decision in *Mixon* and dismissed the Voting Rights claim (App at 18a-27a, 37a). It also affirmed the district court on all other counts (App 35a).

The plaintiffs petitioned for rehearing with a suggestion for rehearing en banc on their claims under the Voting Rights Act and under the Equal Protection clause. The Sixth Circuit denied rehearing and rehearing en banc on August 9 (App at 39a).

The plaintiffs have now petitioned this Court for a writ of certiorari on a claim of overriding national importance—whether the Voting Rights Act allows a state legislature to suspend the right of citizens in black-majority cities to vote for school board while preserving that right in every white-majority city, based on the Legislature's assertion that it had to suspend black parents' right to vote in order to improve the education of black children.

STATEMENT OF FACTS

From the passage of the Northwest Ordinance in 1787 until the passage of the Takeover Act, Michigan had system of public education democratically run by the electorate in each city, town and village. At first, Michigan's citizens controlled their schools directly, through annual school meetings. In 1838, Detroit became the first town to elect a school board, with the practice codified by special statute in 1869 and by general statute thereafter. At various dates, the Legislature enacted special and then general statutes establishing or codifying elected schools boards in all other villages, towns and cities in the State.[2]

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[2] *Belles v. Burr*, 76 Mich 1 (1889); Michigan Manual, 1999, Legis. Serv Bureau; Mich Loc Act 233, Acts of 1869; 1915 PA 15.

As 1999 began, every school board in Michigan was elected—and had been elected for a century or more. MCL 380.11a(7); 380.403a.[3] Each member of each board was subject to recall at any time. MCL 380.1105.

In 38 days, however, a newly-elected Legislature ended this two-hundred year old tradition by suspending for five years the right to elect a school board in one city—Detroit.[4] Under the Takeover Act, Detroit's schools would be run by a "Reform Board" consisting of six members appointed by the Mayor, with the seventh, the state superintendent of education, being appointed by the state board of education. 1999 PA 10, s 380.372; Const 1963, art 8, sec 3. Those seven members would choose by unanimous vote a Chief Executive Officer (CEO), who was to assume all powers of the previously elected board, subject only to veto by specific action of the newly-appointed Board. 1999 PA 10, s 380.372(2), (4); 374(1). In addition to control over the schools, the CEO was to assume control over the remaining $1.3 billion in proceeds from the bond fund that the citizens of Detroit had approved for the construction of new schools.

As was obvious, this Act would result in a very disproportionate disenfranchisement of Michigan's black citizens. Detroit is now over 80 percent black. After passage of the Takeover Act, virtually all of the State's white citizens

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[3] So far as can be determined, the only non-elected school boards in Michigan's history were the county intermediate boards, which provided assistance to local boards. Until 1970, these were appointed. MCL 380.611.

[4] By its terms, the Takeover Act applied to any district that had more than 100,000 students. MCL 380.402. As the Michigan Senate recognized, however, the Act would only ever apply to Detroit, since Grand Rapids, the next largest district in the State, had only 27,000 students (1999 Journal of the Senate 249, App at 118)

still voted for school board—while over 60 percent of the State's black citizens were denied that right. [5]

In imposing this law on Detroit, the Legislative majority repeatedly rejected amendments allowing Detroit's citizens to vote by referendum on the new Act before it went into effect. 1999 Journal of the Senate 242-243, 647. In the final vote, an overwhelmingly white, Republican, suburban and rural coalition overrode the "No" votes of the majority of Detroit's Senators and all of its Representatives. 1999 Journal of the Senate 245; 1999 Journal of the House 537. By its terms, the Act banned from appointment anyone whom Detroit's citizens had elected to the prior school board. 1999 PA 10, s 372(3); MCL 380.372(3). The Act even prevented Detroit's citizens from voting on the new law for five years after it was passed MCL 380.372(3); MCL 380.375. As this petition is being written, one major candidate for Governor and numerous outstate legislators have announced support for an extension of the takeover, still without a vote by Detroit's citizens.

The Legislature made no findings and issued no report stating its reasons for imposing this school board upon Detroit. In floor debates, however, the Act's chief sponsors claimed as their primary motivation a professed concern for the educational difficulties of Detroit's students, difficulties that they claimed were reflected in low test scores and high dropout rates (See, e.g., statement of Sen. DeGrow, 1999 Journal of the Senate, at 249, *see also* App. at 43a-44a).

The Takeover's supporters exaggerated the data and failed to acknowledge that Detroit's students outscored their counterparts from hundreds of other districts, including many where the students were overwhelmingly white and where the

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[5] According to the 1990 census., 777,916 of Michigan's 1,291,706 black residents lived in Detroit. Only four percent of its white residents lived in Detroit.

citizens have to this day have retained the right to vote.[6] Nevertheless, there was no question that the proponents' basic claim that Detroit's students scored less well on standardized tests than the state average and dropped out more often than the state average was true.[7]

The record was also undisputed, however, that those statistics reflected the racial and economic composition of the Detroit district. For many years, the Detroit district has been the most segregated large district in the nation, with over 90 percent of its students being black. Its percentage of students from poor economic backgrounds is double the statewide average; its parents are far less likely to have the educational background to assist their children when they run into academic difficulty; the City has fewer libraries and similar resources; its costs per student are far higher due to aging physical plant, aging equipment, increased security, a higher proportion of disabled students, and a host of other factors; and yet, with all its additional burdens, Detroit has to subsist on $7900 per student per year, while its more affluent neighbors receive up to $12,000 per student per year.[8] As the undisputed declarations of Professors Walter Haney and Richard Gibson established, the district's below-average test

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[6] Detroit's students outscored students from 146 other districts in grade 4 math; 240 other districts in grade 4 reading; 231 other districts in grade 8 science; 101 other districts in grade 8 science; 100 other districts in grade 8 writing; 76 other districts in grade 7 math; 81 other districts in grade 5 writing; and 43 other districts on all elementary tests (JA at 884-891)("JA" refers to the Joint Appendix filed in the Court of Appeals).

[7] According to a report issued by the new CEO of the Detroit district shortly after he was appointed by the takeover board, Detroit's students were graduating ". . . at two-thirds the rate of other Michigan students" and the scores of its eleventh graders were "over 27 percent behind the state average in reading and writing, over 41 percent behind in math, and 38 percent behind in science (JA, at 65).

[8] Michigan Department of Education, Michigan School Report, 1998-1999.

scores and above-average dropout rates are directly correlated with the poverty in and segregation of the district, which reinforce each other and coalesce to cause those scores and dropout rates (JA, at 728-733, 749-758).[9]

As a supplementary reason for the takeover, the sponsors asserted that the Detroit district suffered from a variety of administrative deficiencies, including problems with the bond, "mismanagement," "meddling," and one claimed scandal. The Detroit district had, however, ended the 1997-1998 fiscal year with a $93 million budget surplus, $1.3 billion in remaining bonding authority, and the prospect of increased revenues from casinos, stadiums and other downtown development (JA, at 792-793). Insofar as the supporters of the Takeover complained of mismanagement, they offered no reason for believing that Detroit's voters were less capable than other voters of remedying those problems by electing new officials. As for the scandal, the supporters

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[9] Professor Haney, who is one of the nation's leading experts on the use of standardized tests, prepared a study for this litigation, which was undisputed, showing that scores on the Michigan Educational Assessment Profile (MEAP) tests correlated directly with the income of the districts and that when that was taken into account, there was " . . . little indication that the achievement of students in Detroit schools [on the MEAP test] is dissimilar from achievement in Michigan schools generally" (JA, at 754-755, 758). Professor Gibson, then from Wayne State University, analyzed the deficiencies in the dropout data and asserted the well-established correlation between the economic level of a district's population and the dropout rate of its students. As he stated, without contradiction, students in poorer, urban districts graduate less frequently than students in more affluent areas "...due to a number of social factors, including economic need, the perceived lack of educational and employment opportunities in urban districts, and other factors largely beyond the control of the particular school authorities" (JA, at 730).

failed to note that it had occurred over twenty years ago and that its perpetrators had long since been voted out of office.[10]

By large majorities, Detroit's delegation opposed the Takeover, disputing the claim of educational reform by pointing out that the Takeover's supporters had rejected every amendment to provide more teachers, counselors and funds to address the educational problems of the district. 1999 Journal of the House 342-344, 354-355, 382, 394, 396, 530, 532, 534.

THE PROCEEDINGS BELOW

A. The district court.

In September 1999, the plaintiffs filed suit in the United States District Court asserting, inter alia, that the Takeover Act violated the Voting Rights Act of 1965, the Fifteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs named as defendants the School Reform Board, its Chief Executive Officer, the Mayor of Detroit, and the Governor of the State of Michigan.

The plaintiffs attempted to depose the main legislative proponents of the Takeover to determine what their true motives were. After the district court quashed those depositions on the grounds of legislative immunity, the parties filed cross motions for summary judgment. By an Opinion dated October 25, 2000, the district court denied the plaintiffs' motion and granted those filed by the defendants (App, at 41a).

On the Voting Rights claim, the district court held that it was bound by the Sixth Circuit's decision in *Mixon v. State of Ohio*, 193 F. 3d 389 (1999), which was rendered shortly after

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[10] The twenty-year old scandal involved members of the school board who had appropriated money to provide limousines and drivers for themselves (JA, at 693-694).

the plaintiffs filed the complaint in this case (App, at 63a). In that decision, which was to dominate almost all of the later proceedings in this case, the Sixth Circuit had held that Ohio could change from an elected to an appointed school board in Cleveland, without challenge under the Voting Rights Act, whatever the racial impact of that change might be. The *Mixon* panel had declared that this Court's repeated decisions holding that the Voting Rights Act prevented changes from elective to appointive systems that resulted in the unequal denial of voting rights to black citizens did not apply because those decisions were rendered under Section 5, not Section 2, of the Voting Rights Act. *Mixon, supra*, citing *Allen v. State Bd of Elections*, 393 U.S. 544, 569-570 (1969).

The district court rejected the plaintiffs' claim that *Mixon* was distinguishable because the Cleveland schools, unlike those in Detroit, were found to be in a state of administrative and fiscal collapse at the time of the takeover. It also rejected the plaintiffs' claim that *Mixon* was no longer binding on the district court after this Court had further defined the relationship between Sections 2 and 5 of the Voting Rights Act in *Reno v. Bossier Parrish School Board*, 528 U.S. 320 (2000)(*Bossier Parrish II*)(App, at 64a).

On the plaintiff's equal protection claim, the district court held that it was bound by *Mixon's* holding that denying the vote for school board to one city alone must be reviewed under the rational basis standard and found that the assertion that the change was made for educational reasons was sufficient to establish a rational basis for the takeover (App at 68a-70a).

B. The Sixth Circuit.

The plaintiffs filed a timely appeal to the Sixth Circuit. While recognizing that the panel that was assigned was bound by the prior panel's decision in *Mixon,* the plaintiffs preserved their position that the *Mixon* panel had erred in its

analysis of the Voting Rights Act. Before the panel, the plaintiffs further asserted that the Detroit takeover differed substantially from the one considered in *Mixon* and that the panel should reconsider *Mixon* in light of this Court's decision in *Bossier Parrish II*.

On June 12, 2002, the Sixth Circuit panel rendered a decision affirming the district court in all respects. In an opinion by Judges Gilman and Suhrheinrich and in a concurrence by Judge Merritt, the panel unanimously rejected the plaintiffs' claims under the Voting Rights Act on the grounds that it was bound by the opinion of the prior panel in *Mixon* (App at 18a-27a, 37a). The panel on this case declared that the factual differences between the takeover in Cleveland and that in Detroit were irrelevant, as was this Court's decision in *Bossier Parrish II*. Following *Mixon*, the two judges held that Section 5 and Section 2 of the Voting Rights Act should be interpreted differently, despite their virtually identical words. (App at 18a-27a, 37a).

Judges Gilman and Suhrheinrich further held that aside from *Mixon*, the plaintiffs could not prevail on their Voting Rights claim because they had no fundamental right to elect a school board in the first place, citing *Sailors v. Kent Bd of Educ*, 387 U.S. 105, 108 (1967)(App 22a-23a).

The Sixth Circuit held that there was no evidence of intentional racial discrimination and that the Takeovers' supporters' professions of concern for educational deficiencies were sufficient to state a rational basis for the statute's application to one city alone. The panel further found that the Act did not violate the Michigan Constitution (App at 30a-35a).

In a brief concurring opinion that focused exclusively on the state law and Voting Rights claim, Judge Merritt declared that the "law allows us no leeway to decide the case otherwise" and expressed the opinion that *Mixon* was "directly in

point and necessarily controls the outcome of this case under the Voting Rights Act" (App at 37a).

The plaintiffs filed a timely petition for rehearing with a suggestion for rehearing en banc, asserting that the Circuit should reconsider *Mixon* and hold that the Takeover Act violated Section 2 of the Voting Rights Act and the Equal Protection Clause. The Sixth Circuit denied rehearing and rehearing en banc on August 9, 2002 (App at 39a).

REASONS FOR GRANTING THE WRIT

By holding that black citizens may not challenge under the Voting Rights Act a statute that results in the suspension of the right to vote for school board for 60 percent of the State's black citizens, the Sixth Circuit's decision conflicts with decisions of this Court on an issue of surpassing national importance.

The Voting Rights Act was "designed to banish the blight of racial discrimination in voting" and to "assure that millions of non-white Americans will be able to participate for the first time on an equal basis in the government under which they live." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 337 (1966).

Thirty-five years after the passage of that historic Act, the Sixth Circuit has held that a majority of the Michigan Legislature could deprive 60 percent of the State's black citizens of the right to vote for school board without even being subject to challenge under the Voting Rights Act.

The statute approved by the Sixth Circuit followed a well-trod path. Immediately after Congress passed the Voting Rights Act, Mississippi changed the office of county superintendent of education from an elective to an appointed office in counties defined by various criteria that, without explicit reference to race, included the counties that had a black majority. In an historic decision, this Court held such

changes must be submitted to the Attorney General of the United States for prior approval under Section 5 of the Voting Rights Act because they "affected the power of the citizen's vote" in that "after the change he is prohibited from electing an officer formerly subject to the approval of the voters." *Allen, supra*, 393 U.S. at 569-570.

In repeated decisions since, this Court has reaffirmed *Allen* as a central means to eliminate both subtle and obvious attempts to deny equal voting rights to black citizens:

> We held [in *Allen*] that [Section 5] applies also to . . . state decisions as to which offices shall be elective. [citation omitted]. We observed that 'the Voting Rights Act was aimed at the subtle, as well as the obvious., state regulations which have the effect of denying citizens their right to vote because of their race [citation omitted]. Our decision, and its rationale, have proved sound, and we adhere to both.

Presley v. Ettowah County Commission, 502 U.S. 491, 501 (1992).

The State of Michigan, now supported by the Sixth Circuit, claims the right to disregard *Allen, Presley*, and that rationale because the county where Detroit lies has never been subject to the provisions of Section 5. While Michigan concedes that it must eliminate discriminatory practices at the polls in school board elections, it claims the right to eliminate the polling place altogether for school board in the largest black-majority City in the nation, because, it says, the Act provides different standards and coverage in areas where Sections 2 and 5 of the Act apply than it does in areas where Section 2 applies by itself.

That argument, which is the central basis of the Sixth Circuit's decision, is directly contradicted by the fact that Congress chose virtually identical language for Section 5, which is not applicable to Detroit, and Section 2, which is applicable to Detroit. It also directly contradicts the policy,

reflected in that language, that there be one national standard for judging violations of the Voting Rights Act—a standard enforced by different procedures, but a single standard nonetheless. It finally contradicts the specific holdings of this Court—and the specific declarations by virtually every Justice—that the coverage and substantive standards of Sections 2 and 5 are, with exceptions not here relevant, identical.

In *Chisom v. Roemer*, 501 U.S. 380 (1991), this Court held that the citizens of Louisiana could maintain a challenge under Section 2 to the procedures used to elect judges because, in part, the Court had previously held that Section 5 applied to judicial elections and it was "highly unlikely" that Congress intended that the coverage of the two sections be different:

> If Section 2 did not apply to judicial elections, a State covered by Section 5 would be precluded from implementing a new voting procedure having discriminatory effects with respect to judicial elections, whereas a similarly discriminatory system already in place could not be challenged under Section 2. It is highly unlikely that Congress intended such an anomalous. result.

Chisom, supra, 501 U.S. at 401.

While this is at the very least an alternative basis for this Court's holding in *Chisom*, the Sixth Circuit on two occasions cursorily dismissed an Opinion signed by seven Justices as dicta (App at 24a; *Mixon, supra*, 193 F. 3d at 407).[11]

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[11] In *Chisom*, this Court held that "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed . . ." *Id*, at 401. As is apparent, the Court held that Louisiana could change its statewide system to an appointive one without running afoul of the Voting Rights Act; there is, however, not the slightest suggestion that the Court was abandoning *Allen* to allow Louisiana to do so in black majority areas alone.

The Sixth Circuit also ignored repeated statements from the Justices of this Court that Sections 2 and 5 had the same coverage and established the same substantive standards. For example, it ignored Justice O'Connor's declaration that "I do not think it is possible to read the terms of Section 2 more narrowly than the terms of Section 5." *Holder v. Hall*, 512 U.S. 874, 886 (1994)(O'Connor, J, concurring in part and dissenting in part). Similarly, it ignored the view expressed by Justices Breyer, O'Connor and Souter, citing the House Report on the 1982 amendments, that ". . . the substantive standards for Section 2 and 5 violations are the same, so long as the challenged practice represents a change from 1965 conditions . . ." *Morse v. Republican Party of Virginia*, 517 U.S. 186, 209 n 25 (1996).

Indeed, the panel ignored the fact that even those Justices who are inclined to a narrower construction of the Voting Rights Act have declared that the language of "Sections 2 and 5 would appear to be designed to work in tandem" and that, if anything, Section 2 has a "broader sweep" than Section 5. *Morse, supra*, 517 U.S. at 281(Thomas, Rehnquist, Scalia, JJ, dissenting). See also *Bossier Parrish II, supra* (Section 5 covers only retrogressive changes, while Section 2 covers changes with discriminatory purposes or results).

As its asserted grounds for departing from the policy that there is one national, substantive standard—and for departing from the statute and the decisions that have established that policy—the Sixth Circuit held that the history of blatant racial discrimination in the South and the other areas covered by Section 5 justified "interpreting the two sections differently" (App at 25a; see also *Mixon, supra*, 193 F 3d at 407-408). Apart from *Bossier Parrish II*–which holds that Section 2 has, in most cases, a *broader* sweep than Section 5–the Sixth Circuit cited no decision from this Court *or from any court* that ~~it even~~ claimed supported this central basis for its opinions (App at 25a). In fact, the Circuit *could* cite no such

decisions, because this Court and the other circuits have repeatedly declared that the coverage and standards set by Sections 2 and 5 are the same. See, for example, *League of Latin American Citizens v. Clements*, 914 F 2d 620, 644-645 (CA 5 1990)(scope of Section 2 and 5 identical) (Higginbotham, J, concurring), *rev'd on other grounds sub nom Houston Lawyers' Assoc v. Attorney General of Texas*, 501 U.S. 419 (1991); *Smith v. Salt River Project*, 109 F 3d 586 (CA 9 1997)("It therefore seems logical that § 2 should reach *at least as far as § 5*")(emphasis added).[12]

Under the Sixth Circuit's misconstruction of the Voting Rights Act, in place of one national standard enforced by different procedures in different areas, there are now different standards for different states subject to Section 5 and those that are not subject to Section 5. In many states, including Michigan, that have counties that are covered and others that are not covered by Section 5, there are now different standards in the different areas of the same state. In fact, under the Sixth Circuit's decisions, there are even different standards in the states and counties that are covered by Section 5, depending upon whether the voter invokes Section 5 or Section 2 to challenge the claimed violation.

The panel majority's alternative holding only deepens the quagmire into which the Circuit has gone. According to the panel, the plaintiffs have no Section 2 claim because they did not have "the right to do something (elect school board members) that they never had a fundamental right to do."

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[12] Without support from *any* case holding that a *change* from an elective to an appointive office could escape scrutiny under the Voting Rights Act, the Sixth Circuit was forced to rely on irrelevant cases holding that the Act did not require states to convert long-established appointive systems into elective ones. *See, e.g., Irby v. Virginia State Board of Elections*, 889 F 2d 1352, 1358 (CA 4 1989); *African-American Citizens for Change v. State Louis Bd of Police Comm'r*, 24 F 3d 1052, 1053 (CA 8 1994) and other cases cited by *Mixon*, 193 F 3d at 407.

(App at 22a-23a, citing *Sailors, supra*, 387 U.S. at 109. In *Chisom*, however, this Court *squarely* rejected that assertion by holding that while Louisiana did not have to provide for the election of its judges, if it chose to do so, it had to hold those elections in compliance with the Voting Rights Act. *Chisom, supra*, 501 U.S. at 401-402.

The Sixth Circuit's departure from the clear words and definitive interpretations of one of the most important statutes enacted in the last century would by itself present a question of major importance to the nation. But the violation is not simply one of defying the words of the statute and of the Court. As a result of the Sixth Circuit's decisions, black citizens in two of the nation's largest cities have now been subjected to a discriminatory denial of the right to vote in an area precious. to any citizen—the right to control the education of his or her children. That result cannot but undermine the legitimacy of the school boards–and of the laws that sanction such a result.

While both *Mixon* and *Moore* are dangerous decisions, the panel's decision in this case poses a special threat to the Voting Rights Act. Michigan's Legislature denied the vote to Detroit not because of some temporary administrative or fiscal crisis, but because of test scores and dropout rates that are indisputably correlated with and caused by the racial and economic composition of the Detroit district. If allowed to stand, the takeover in Detroit means that virtually any black or Latino majority district in the country can be denied the right to vote virtually at will. Indeed, this Court has already considered, and dismissed on ripeness grounds, an action testing the application of the Voting Rights Act to a Texas statute authorizing the appointment of masters to oversee elected local school boards if the students' test scores and graduation rates did not meet particular standards. *Texas v. United States*, 523 U.S. 296 (1998).

Whatever one's views of high-stakes testing, denying the right to vote to black and Latino parents because of their children's test scores is not a result that can possibly be sanctioned under the Voting Rights Act.

Nor is the issue presented in this case confined to education alone. If the right to vote for school board can be denied because of statistical indices tied to race and poverty, the right to vote for prosecutors and judges can also be denied because there is almost always more identified crime in less privileged areas. Indeed, for any office where voting is not required by the Constitution, votes could be suspended in black, Latino and other minority areas because of indices linked to poverty and segregation.

In reaching the result that it did, the Sixth Circuit was undoubtedly concerned with the real or perceived educational deficiencies in the Detroit district. But so are the parents and citizens of Detroit. As reflected in the votes of their representatives, in their continued resistance to the takeover, and in the continued refusal of the Legislature to allow Detroit to vote on the takeover, Detroit's citizens do not believe that suspending their right to vote has improved or will improve the education of their children.[13]

But the crucial question under the Voting Rights Act is *not* the motive of the overwhelmingly white legislative majority that voted to deny the franchise to a black-majority City. After years of bitter experience, Congress declared that "proof of intent is no longer required" and by statute applicable to all areas of the country outlawed practices that *result* in the denial of equal voting and political rights to black citizens. *Chisom, supra*, 501 U.S. at 394, citing 42 USC 1973.

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[13] Indeed, as the supporters of the takeover have themselves announced, three years after the takeover, the students' test scores have gone down, not up.

In place of the Act's results standard, applied nationally, the Sixth Circuit has reinstituted a standard of intent in judging takeovers in those vast regions of the country that are not subject to Section 5. In place of the Act's declared policy of eliminating both blatant and subtle forms of discrimination, *Allen, supra*, the Sixth Circuit has substituted a policy under which voters can only challenge practices and statutes that are so blatant that the plaintiffs can overcome almost insurmountable hurdles and prove that the Legislature harbored a racially discriminatory intent.

CONCLUSION

For a right so precious, a statute so important, and a result so pernicious to the nation, the Sixth Circuit's defiance of this Court's holdings and of the statute upon which they are based should not be allowed to stand. The petitioners request that the Court grant their petition for certiorari.

Respectfully submitted,

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